In The

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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No. 75-1004

GUADALUPE JIMENEZ, et al.,
Appellants,

vs.

HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 2, et al.,
Appellees.

ON APPEAL FROM THE THREE-JUDGE PANEL OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT

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Pursuant to Rule 16, Paragraphs 1(a) and 1(c), Revised Rules of this Court, Hildago County Water Improvement District No. 2 and its officers and directors, Appellees here, move that this appeal be dismissed or, alternatively, that the judgment of the three-Judge District Court be affirmed.

QUESTIONS PRESENTED

The Jurisdictional Statement of Appellants (pg. 8) lists three numbered questions as presented by them on this appeal as follows:

1. Whether the plaintiffs and the class they represent were denied due process of law in the exclusion of their property from the defendant districts without reasonable and adequate notice of their right to be heard on an issue of substantial and direct interest?

2. Whether the exclusion of plaintiffs' communities from the districts for impermissible political motives denied plaintiffs the equal protection of the law?

3. Whether by singling out railroads as a favored class of landowner entitled to actual notice of a proposed exclusion of realty, Article 8280-3.2, V.A.T.C.S., denied to all other landowners, such as plaintiffs and their class, the equal protection of law?

STATUTE INVOLVED

The statute involved is Art. 8280-3.2, Vernon's Annotated Civil Statutes (J.S. 3). Section 7 of the Article is not included and is as follows:

> The fact that urban property, as defined in this Act, unsuitable for irrigation or agricultural purposes, is, or may be, contained within the boundaries of water control and improvement districts engaged principally in supplying water for agricultural irrigation purposes, and that there is no feasible means of excluding such urban property from such districts, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and the same is hereby suspended; and this Act shall take effect from and after its passage, and it is so enacted.

The statute provides a method by which urban properties as therein defined can be excluded from Water Control and Improvement Districts such as District 2 upon ascertainment of the facts authorizing such exclusion as provided in Section 5 (J.S. 6).

STATEMENT OF THE CASE

On October 28, 1971, the Board of Directors of Hidalgo County Water Improvement District No. 2 ordered the exclusion of thirty-nine "urban properties" as authorized by the statute in question. Appellants admit that the statutory notice was given and the hearing held (J.S. 9). The District Court found that the necessary facts authorizing the exclusions were found by the Board of Directors as a result of the hearing and that such findings are not challenged by Appellants (J.S. pg. 15a, N. 10, pg. 23a).

This suit was filed on December 16, 1972, by various of the Appellants, residing, or owning property, in the urban properties so excluded, in the District Court challenging the exclusion statute on the grounds that the constructive notice provided by the statute denied them due process of law; that they had been denied equal protection of the law as a result of the District Directors allegedly "fencing" them out of the electorate for impermissible political motives, and that the provision of the statute requiring notice by mail to railroad companies denied all other property holders equal protection of the law (J.S. 9). The case was tried on the merits before a three-Judge Court duly convened on July 14, 1975, and the opinion of the Court

and final Judgment was filed on October 2, 1975, denying all relief sought by Appellants on the basis of both the facts and the law and this appeal followed. The opinion of the District Court appears at page 1a of the Appendix, and the Judgment at page 58a of such Appendix.

The facts were stipulated by the parties and the Court found the facts to be as stipulated (App. pg. 4a). Accordingly, it seems that such express finding of facts by the Court, most of which are not contained in the opinion, should be appended to the Jurisdictional Statement (Rule 15 (1)(h)). Appellants have not complied with such requirement. In the complete absence of all the facts upon which the Judgment appealed from was based, it appears that neither error in the Judgment nor the substantial character of the questions posed by Appellants can be properly determined by the Court.

REASONS FOR GRANTING THE MOTION

Only the questions presented are entitled to consideration by this Court and in the context of the case are not only unsubstantial, but have already been decided contrary to the contentions of Appellants.

The reasons given for Appellants' desire to have their properties remain in the district or continue as residents thereof (J.S. pg. 12-14) are immaterial. There is no constitutional right to either municipal water or sewerage facilities as clearly appears from the opinion of this Court in *Lindsey* v. *Normet*, 92 S.Ct. 862, 974 (1972), where the Court held that there is no constitutional guarantee of access to dwellings of a particular quality and that absent constitutional mandate the assurance of adequate housing and definition of

landlord-tenant relationships are legislative, not judicial functions. Insofar as Appellants' contentions are concerned relative to a layer of invisible governments lacking in accountability to its constituency (J.S. pg. 14-15), District No. 2 is operated by a Board of Directors elected by the qualified electors in annual elections, three being elected in one year and two in alternate years (Texas Water Code, Art. 51.073). Additionally, under the Texas Open Meetings Act (V.A.C.S. Art. 6252-17), which requires a posted agenda from which the Board cannot vary in its meetings (save in rare circumstances), there is full opportunity to ascertain how the Directors are performing their duties and complying with the wishes of the district's electorate. If dissatisfied, the remedy is political, not judicial.

The real issues in this case are not why the owners of excluded urban properties or residents of such properties do not want the properties excluded, but the question of whether the power and authority of the State to regulate and control its own subdivisions and municipalities, was lawfully exercised in this case insofar as District No. 2 is concerned.

Appellants' Contentions Concerning Lack of Due Process Present No Substantial Question

The main thrust of Appellants' whole argument of necessity rests upon the contention that there is a constitutional right to have one's property included in a water control and improvement district and to reside in such a district and the position is then pursued into the argument relative to denial of procedural due process based on constructive, as distinguished from actual personal, notice. The requirements of procedural

due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property and when protected interests are implicated, the right to some kind of prior hearing is paramount but the range of interest protected by procedural due process is not infinite, *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972). The same rule is announced in *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971).

The cases cited by Appellants in their attempt to present this case as a voting rights case (J.S. 16) are not persuasive because the decisions of this Court construing such cases in *Gordon* v. *Lance*, 403 U.S. 1 (1971) and *Hill* v. *Stone*, 95 S.Ct. 1637 (1975) clearly distinguish such cases from those applicable here. In each of the cases relied on by Appellants, the action complained of involved direct and intentional restrictions and limitations on the exercise of the franchise itself and so resulted in an unconstitutional and discriminatory classification. In *Adams* v. *City of Colorado Springs*, 308 F.Supp. 1397 (D.C. Colo. 1970), summarily affirmed 399 U.S. 901 (1970), rehearing denied 400 U.S. 855 (1970), the three-Judge Court held that the principles of voting rights cases were not applicable to annexation proceedings and this Court has held that there is no difference between an annexation and exclusion or detachment proceedings. *City of Richmond* v. *United States*, ... U.S. ....., 45 Law Ed. 2d 245, 260 (1975).

Mullane v. *Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950); *Schroeder* v. *City of New York*, 371 U.S. 208 (1962); *Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *Sniadach* v. *Family Finance Co.*, 395 U.S. 337 (1969); *Goldberg* v. *Kelly*, 397 U.S.

254 (1970) are inapposite to the instant case. Each of such cases generally involve the type of notice or hearing required by adjudication in judicial proceedings or where the parties held entitled to personal notice would be deprived of a prior existing and ascertainable property right. Furthermore, they generally involve controversies between individuals required to be settled in the ordinary course of judicial proceedings.

This case clearly comes within the concept of notice required by procedural due process as explained by this Court in *Mullane* v. *Central Hanover Bank and Trust Company*, supra, and *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy, et al.*, 367 U.S. 886 (1961). Each of such cases make it clear that the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation and that due process is not a technical conception with a fixed content unrelated to time, place and circumstance, but is compounded of history, reason and the past course of decisions, and any construction of due process which would place impractical or impossible obstacles in the way would not be justified. Accordingly, it is apparent from such decisions that where official action such as here involved is concerned, personal notice is not required and is impractical and impossible. Here over 5000 people would be entitled to personal notice. According to Appellants' own statement (J.S. pg. 12) many owners or residents are migrant farm laborers and if temporarily absent it would be virtually impossible to locate them or give actual personal notice to them. If personal notice should be required, as contended by Appellants, failure of a single party to receive such notice would invalidate an entire official

action or project. The decisions of this Court make it clear that constructive notice of the type provided and given in this case meets all the requirements of procedural due process. Under Appellants' concept of the requirement of personal notice in cases such as this, the States and their political subdivisions would be placed in a constitutional straitjacket and unable to carry out or discharge their legal or discretionary duties or obligations.

Personal notice was not required and under the decisions of this Court no substantial question in this area is presented warranting plenary consideration by the Court.

As to Appellants' Contention That the Exclusion of Their Communities From District No. 2 for Impermissible Political Motives Denied Them the Equal Protection of Law

Appellants' position under this point is based in its entirety on the following statement:

> The stipulated evidence and the Appellees' own judicial admissions confirmed the plaintiffs' original suspicions that the exclusion statute was a device created by the Valley water districts for the purpose of fencing the *colonias* out of the districts for the constitutionally impermissible reason that the urban residents constituted a political threat to continued farmer control of the districts. In short, the *colonias* residents have been the victims of an invidiously discriminatory political gerrymander. They have been "fenced out" of the water district electorates because of the defendants' fears of the "political mischief" they might cause (J.S. 22-23).

These Appellees made no such judicial admission and the evidence as stipulated and the facts found by the Court (which are not appended to the Jurisdictional Statement) do not support the contentions of Appellants as to the reasons for the exclusions of the non-irrigable and non-agricultural urban properties and for which owners of residential lots in such properties did not desire irrigation.

The District Court, with the stipulated facts before it, refused to find that the exclusions were effected for the purpose of fencing out Appellants for impermissible political reasons (J.S. pg. 12a, F.N. 5, pg. 22a), and answered Appellants' contention in such respects on a purely hypothetical basis.

Irrespective, however, of the failure of Appellants to discharge their burden of proof as to the alleged reasons for the exclusion of the urban properties, it is clear that both the statute complained of and the action of the Board of Directors of District 2 were not designed to exclude the urban properties because of the alleged political threat of the residents to continued farmer control of the districts. The exclusions were concerned with land and not with people. The facts upon which the right to exclude depended were pursuant to established state policy and dealt with local, economic and state problems where legislatures have historically drawn lines which this Court has respected against the charge of violation of the equal protection clause if the law be "reasonable, not arbitrary * * *" and bears "a rational relationship to a permissible state objective". *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 6 (1974); *Reed* v. *Reed*, 404 U.S. 71, 76 (1971).

In *Dandridge* v. *Williams*, 397 U.S. 471, 486 (1970), this Court likewise held that the Fourteenth Amend-

ment gives the Federal Court no power to impose upon the States their views as to what constitutes wise economic state policy.

Appellants misconceive the constitutional nature of the right to vote. In *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973) this Court citing *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), held that the right to vote, per se, is not a constitutionally protected right, and that references to such right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters and that it is not the province of the Federal courts to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. In that case the Court held that education was not among the rights afforded explicit protection under the Federal constitution and applied the legitimate state objective test. In this case the right to have one's property included or remain in, or to be a resident of a water control and improvement district, is not a right afforded explicit or any other type of recognition or protection under the constitution, and the legitimate state objective test is equally applicable.

In *Clark* v. *Kansas City*, 176 U.S. 114 (1900), a question similar to the one here involved was raised in an annexation case. The Court recognized the distinction between agricultural lands and non-agricultural lands holding that:

> "We think the distinction is justified by the principle of the cases we have cited. That principle leaves to the state the adaptation of its laws to its conditions. The growth of the cities is inevitable, in providing for their expansion it may be the

> judgment of an agricultural state that they should find a limit in the lands actually used for agriculture. Such use, it could be taken for granted, would only be temporary. Other uses, certainly those to which the plaintiff puts its lands, can receive all the benefits of the growth of a city, and not be moved to submit to the burdens. Besides, such uses or manufacturing uses adjacent to a city may, for its order and health, need control. Affecting it differently from what farming uses do may justify, if not require, their inclusions within the municipal jurisdiction."

The same principles apply to the exclusion of non-agricultural property from irrigation districts.

In Texas, irrigation and agriculture are synonymous. That the promotion of agriculture is a valid public and national purpose is recognized by this Court in *Ivanhoe Irrigation District* v. *McCracken*, 257 U.S. 275 (1958). The Texas Constitution expressly provides that the irrigation of its arid, semiarid and other lands needing irrigation are public rights and duties and the Legislature shall pass all laws as may be appropriate thereto. V.A.T.C., Art. 16, Sec. 59(a).

Hidalgo County Water Improvement District No. 2 although possibly having slightly more power than did the Tulare Lake Basin Water Storage District considered and described by this Court in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) is still a special purpose district with limited power and low down on the scale or grade of corporate existence as held in *Lower Nueces River Water Supply District* v. *Cartwright*, 274 S.W.2d 199 (San Antonio Ct. Civ. App., 1954), writ ref., n.r.e.; *Tri-City Fresh Water Supply District No. 2* v. *Mann*, 142 S.W.2d 945 (Tex. Sup. 1940); and

Deason, et al. v. *Orange County Water Control and Improvement District No. 1, et al.*, 244 S.W.2d 981 (Tex. Sup. 1952). In *Salyer Land Co.* this Court upheld the right of the Legislature of California in the type of a district there involved to absolutely deny the franchise to certain residents of the district who were otherwise qualified electors, while admitting corporations to vote and even permitting weighting of the votes cast in accordance with the valuation of the properties owned by the voters. Certainly, in the light of this Court's opinion in such case upholding the direct denial of the franchise to certain residents and the weight to be given to the votes of various electors, including corporations, this Court should certainly have no difficulty in sustaining both the statute here involved and the exclusion of the various urban properties pursuant thereto of which the Appellants complain because designed and intended to carry out both the mandate of the Constitution and the policy and judgment of the Legislature in the economic field over which the Courts are without control.

If Appellants are correct in their contentions as applied to the situation in this case, future annexation to or exclusions from municipal and other political subdivisions would be constitutionally impermissible because either of the same would deny the franchise to, or dilute the rights of, some voters.

As to Appellants' Contention of Denial of Equal Protection As the Result of the Statutes Requiring Notice by Mail to Railroad Companies

Section 4 of the Act only requires notice to railroad companies where a portion of their rights-of-way are to be actually excluded from the district. Appellants do not contend that any such railroad right-of-way was in any manner involved in the exclusion proceedings in question. That the procedure involved local legislative proceedings is unquestioned and notice of such proceedings by publication and posting as provided by the statute clearly met the due process test as heretofore shown. Inasmuch as the constructive notice provided and given satisfied the requirements of procedural due process to Appellants, they are not in a position to complain of the fact that actual notice to railroads was required. That there was strong justification for providing special notice to the railroads appears from the Court's opinion (App. 19a-20a). Likewise, as the Court pointed out (App. 19a) the legislation attacked by Appellants involved neither fundamental rights nor classifications based upon suspect criteria (App. 19a). The classification, if such it was, was clearly a matter for the determination of the legislature. *Crescent Cotton Oil Company* v. *State of Mississippi*, 257 U.S. 199 (1921); *Hammond Packing Company* v. *Arkansas*, 212 U.S. 322 (1909); *Baltic Mining Company* v. *Massachusetts*, 231 U.S. 68 (1913).

In *Lehnhausen* v. *Lake Shore Auto Parts Co., et al.*, 410 U.S. 356 (1973) the Supreme Court held that the Equal Protection Clause does not mean that a state may not draw lines that treat one class of individuals or entities different from the others and that the test is whether the difference in treatment is an invidious discrimination, citing *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 666 (1966). That prohibition of the Equal Protection Clause of the Fourteenth Amendment goes no further than invidious discrimination is clearly held in *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1955); *Morey* v.

Doud, 354 U.S. 457 (1957) and *Ferguson* v. *Skrupa*, 372 U.S 726 (1963). The showing that different persons are treated differently is not enough to show denial of equal protection, *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964).

In *State of Washington, ex rel. Bond & Goodwin & Tucker, Inc.* v. *Superior Court of Washington for Spokane County, et al.*, 289 U.S. 361 (1933) the Court held a statute authorizing substituted service on a foreign corporation after withdrawal from state under the circumstances there involved did not deny due process and that the Legislature was entitled to classify corporations and a mere difference in the method of prescribing how substituted service should be accomplished worked no unjust or unequal treatment of the Appellant. In *Dohany* v. *Rogers*, 281 U.S. 362 (1930), the Court held specifically that the Due Process Clause does not guarantee to the citizen of a state any particular method of state procedure and that "nor does the equal protection clause exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another."

In *Louisville Gas and Electric Company* v. *Coleman*, 277 U.S. 32 (1928) Mr. Justice Brandeis in his dissenting opinion compiled a long list of cases in which the Court had sustained various classifications in many fields of litigation where the Court had not found a violation of the Equal Protection Clause of the Fourteenth Amendment. Likewise, in *Metropolitan Casualty Insurance Company of New York* v. *Brownell*, 294 U.S. 580 (1935), the Court held that a statutory discrimination will not be set aside as a denial of equal protection of the laws if any statement of facts reasonably may be conceived to justify it.

Under the previous decisions of this Court, Appellants claim that they were denied due process because of the type of notice required where rights-of-way of railroad companies were involved does not present a substantial question warranting plenary consideration by this Court.

CONCLUSION

In conclusion, it is submitted that in the instant case it indelibly appears that in the exclusions complained of, the decision was based upon the Legislature's determination of the economic interest of the state and compliance with the mandate of the people as contained in Article 16, Section 59(a) of the Constitution (Vernon's Annotated Texas Constitution, Vol. 3) making it a public right and duty to be carried out by the Legislature, in order to irrigate and reclaim lands such as those in District 2, situated in the arid or semiarid portion of Texas, and where irrigation is essential to agriculture.

It is respectfully urged that no substantial question requiring plenary consideration by this Court exists in the clear context of this case and the appeal should be either dismissed or, alternatively, the judgment of the three-Judge District Court affirmed.

Respectfully submitted,

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PROOF OF SERVICE

It is certified that all parties required to be served have been served.

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